

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

FILED  
04 OCT 22 PM 4:01  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA :

-v- :

CR 00-S-0422-S

ERIC ROBERT RUDOLPH,  
Defendant :

**UNITED STATES' RESPONSE TO THE COURT'S MEMORANDUM  
OPINION AND ORDER OF OCTOBER 14, 2004 REGARDING  
RUDOLPH'S MOTION FOR DISCOVERY OF MATERIALS RELATED  
TO THE SCIENTIFIC TESTING OF ATLANTA BOMBING EVIDENCE**

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, and Michael W. Whisonant and William R. Chambers, Jr., Assistant United States Attorneys, and R. Joseph Burby, IV, Special Assistant United States Attorney, and respectfully files this Response to the Court's Memorandum Opinion and Order of October 14, 2004 Regarding Rudolph's Motion for Discovery of Materials Related to the Scientific Testing of Atlanta Bombing Evidence, as follows:

Before responding to the specific questions posed in the Court's Order, the government wishes to clarify exactly what defendant seeks in his motion and how this issue came before the Court. The indictment in this case charges the defendant with detonating a bomb outside an abortion clinic in Birmingham in 1998, killing a police

officer and critically injuring a nurse, in violation of 18 U.S.C. § 844(i). The defendant is charged in a separate indictment in the Northern District of Georgia with detonating five bombs at three different locations in the Atlanta area between 1996 and 1997. Those bombings killed one person and injured hundreds. One of the bombings defendant is charged with committing in Atlanta occurred at Centennial Olympic Park during the 1996 Summer Games.

The government has represented to the Court and the defense on numerous occasions that it does not intend to introduce any evidence related to the Atlanta bombings in either the guilt or penalty phases of this trial. Nevertheless, pursuant to the liberal discovery policy it has adopted in this case, the government has produced to the defendant hundreds of thousands of pages of discovery relating to its investigation of the Atlanta bombings. **Included within those materials are all reports of scientific testing performed on any evidence from that investigation.** The government produced the scientific test results from the Atlanta case even though, once again, it has no intention of introducing those test results (or any other evidence connecting defendant to the Atlanta bombings for that matter) into evidence during the trial of this case.<sup>1</sup>

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<sup>1</sup> Those test results, as well as all the other evidence connecting Rudolph to the Atlanta bombings, will be presented to a jury in the Northern District of Georgia when he is tried there following the trial in this case.

With respect to the single Birmingham bombing charged in this case, the government has provided the defendant with summaries of the expert testimony it intends to present at trial in accordance with Rule 16(a)(1)(G). Those summaries confirm the government's repeated statements that it does not intend to introduce any Atlanta scientific evidence. The government has also provided to the defense extensive discovery relating to the tests performed by its testifying experts, including their official reports and their "bench notes," which include machine print-outs of test results, photographs and other work papers, as well as layouts of the laboratories where tests were performed, resumes of non-testifying experts that were involved in any way in the testing, etc..

Despite the government's repeated statements that it does not intend to introduce any Atlanta scientific evidence during the Birmingham trial, in his motion, defendant seeks the same breadth of expert discovery from the government with regard to the Atlanta scientific evidence as the Birmingham scientific evidence. He seeks, for example, the "bench notes" of the government's non-testifying experts from the Atlanta case and extensive information about the labs where the testing was performed. The government opposed defendant's motion on the grounds that what he requested exceeded the scope of Rule 16 and was not material to defendant's preparation of his defense, since the government would not be introducing any such

evidence against him at this trial. The magistrate agreed, and the defendant appealed this ruling to this Court.

In his reply brief to the Magistrate and his appeal to this Court, the defendant claims for the first time that the Atlanta bombing evidence is material to his defense because he needs it to prove, during the penalty phase, the mitigating factor that he does not have a significant history of other criminal conduct. 18 U.S.C. § 3592(a)(5). If defendant is serious about this claim, what he suggests is that after being convicted of the single Birmingham bombing, and after the government during the penalty phase makes no mention of any other bombings defendant is charged with committing, the defendant would affirmatively present to the jury the fact that he is charged with committing three other bombings in Atlanta, one of which killed a woman right in front of her teenage daughter, and would then seek to introduce evidence that he is in fact innocent of those charges (apparently by introducing and then trying to refute the scientific test results from the Atlanta case that connect him to the bombings there). The government submits that this nonsensical approach to establishing the mitigating factor of no prior criminal history should not make the Atlanta scientific evidence material to the preparation of the Birmingham defense.

Having clarified the background on this issue, the government turns now to the Court's Order. The first question posed by the Court asks how the government would

respond if defendant actually followed the above strategy or, alternatively, introduced evidence of the Atlanta bombings (and the alleged weaknesses in the government's case against him there) for the purpose of demonstrating that he does not pose a future danger.<sup>2</sup> In either situation, the government would be forced in rebuttal to "set the record straight" regarding the Atlanta bombings, which would potentially involve calling hundreds of witnesses, extending the length of the trial by weeks or even months. The government's answer to the Court's first question is therefore "no," it could not possibly maintain its current position under the circumstances the Court describes. The government could not be expected to simply stand by and watch as the defense constructed a straw house only to blow it down.

With regard to the Court's second question, the government proposes that the parties enter into the attached Stipulation. The Stipulation could be entered into evidence by the defense and read to the jury during the penalty phase. The Stipulation would thus be positive evidence the defendant could rely upon to satisfy his burden of proof with regard to the mitigating factor that he has no significant prior

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<sup>2</sup> As indicated in its Notice of Intent to Seek the Death Penalty, the government will seek during the penalty phase to establish the non-statutory aggravating factor that defendant poses a future danger because he is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others. **The government will not use the Atlanta bombing evidence to establish this aggravating factor.**

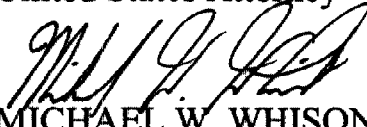
history of other criminal conduct. It must be noted that the Stipulation encompasses only prior *violent* criminal conduct by defendant because the government will present evidence of other non-violent criminal conduct that defendant has engaged in unrelated to the Atlanta bombings. Regardless, the defendant would be able to use the Stipulation to argue to the jury that it should find in his favor with regard to the mitigating factor.

If the defendant truly seeks, as he now claims, to only use the evidence of the Atlanta bombings to establish the mitigating factor of no significant history of prior criminal conduct, then the proposed Stipulation should be acceptable to him because it essentially accomplishes that objective. With effective voir dire, and an instruction from the Court that the jury may only consider evidence presented at the trial, the Stipulation should eliminate the dark shadow of the Atlanta bombings that defendant claims will be cast over his trial. If the parties agree to the Stipulation, the government requests to be relieved from producing any further discovery related to

the Atlanta bombings, as those bombings will no longer have any possible relevance to the trial of this case.

Respectfully submitted this the 22<sup>nd</sup> day of October, 2004.

ALICE H. MARTIN  
United States Attorney



MICHAEL W. WHISONANT  
Assistant United States Attorney


**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this 22<sup>nd</sup> day of October, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

Ms. Judy Clarke  
c/o 310 Richard Arrington, Jr. Blvd., 2<sup>nd</sup> Floor  
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MICHAEL W. WHISONANT  
Assistant United States Attorney



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UNITED STATES OF AMERICA	:	
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V.	:	CR 00-S-0422-S
	:	
ERIC ROBERT RUDOLPH,	:	
Defendant	:	

**STIPULATION**

Comes now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, and Michael W. Whisonant, Assistant United States Attorney, and the defendant, Eric Robert Rudolph, by and through his counsel of record, Judy Clarke, and together file the following stipulation. It is the intent of the United States and the defendant that this stipulation applies only to the possible existence of the mitigating factor defined at 18 U.S.C. § 3592(a)(5) in the above-styled case, and does not otherwise bind either party in any other litigation before this or any other Court.

1. The parties agree and stipulate that there is no evidence before this jury that the defendant, Eric Robert Rudolph, has a significant prior history of violent criminal conduct.

Respectfully submitted this the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

ALICE H. MARTIN  
United States Attorney

MICHAEL W. WHISONANT  
Assistant United States Attorney

JUDY CLARKE  
Counsel for Defendant